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ABSTRACT

In the past decade the amount of legislation and litigation involving informal marriages has increased. Historically, a close connection between marriage and property law has existed. However, children today are less important for property inheritance purposes because informal marriages have increased in popularity and are accepted among diverse social groups. The Family Law Act in Australia permits divorce on grounds of irretrievable breakdown and also prescribes the rights and obligations of marriage partners. Any relationship outside of marriage, however, must be legislated at the state level. In Australia the legal reaction to informal marriages has been sporadic, inconsistent and contradictory, although a body of case and statute law covers aspects of unmarried cohabitation. This trend is also evident in countries with similar legal systems. (RC)

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WORKING PAPER

Informal Marriages

by Margaret Harrison

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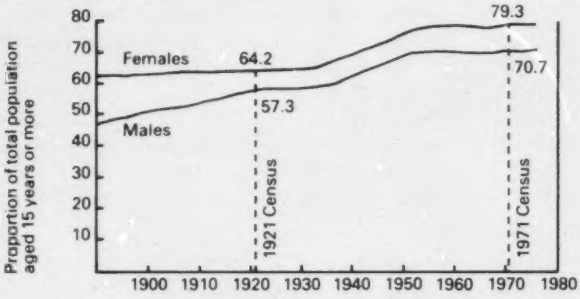
Legal *(de jure)* marriage is by far the most popular base for the creation of a family in Australia.

Nineteen seventy-one was a year in which marriage reached a peak, and Census figures for that year show that 86 per cent of men and 94 per cent of women had married before the age of 35. Furthermore, over 90 per cent of men and 94 per cent of women had married before 45. Although that peak has declined somewhat in the succeeding decade, the proportions of people marrying remains very high and one explanation for a small decline in the numbers marrying at an early age is that Australians are delaying marriage, for reasons which will be discussed later.

Figure 1: Proportions of adult Australian population ever married, 1891-1976



Available divorce figures have encouraged much speculation about the future popularity and even existence of marriage in our society; however, the recent tapering off in divorce has caused demographers to comment that the figures are approximating those which would have been reached if the *Family Law Act* (1975) had not been passed.

Beyond the area of marriage and divorce we find speculation and confusion. Nineteen seventy-six Census figures show that in approximately 2 per cent of households which contain a head and spouse, the head is either permanently separated from another union, is widowed, divorced or has never married.

A survey of 'recently married' Melbourne women in 1977 reported that 4.5 per cent of those in the sample of young women living in private dwellings were 'de facto' wives. However, there are really no statistics of the incidence of de facto (called throughout this paper informal) unions. Although the 1976 Census made allowance in its questions for 'de facto' unions, this data has not been analysed, and the incidence of informal marriages can therefore only be inferred from the marital status of family heads. No operational definition of informal spouse has been prepared for the 1981 Census, nor has provision been made for a specific question or prompt on this subject.

Consequently, no definite statement can be made to the effect that these relationships are on the increase, although empirical evidence suggests that they are, and surveys indicate that public opposition to them has weakened considerably. In 1976 72 per cent of those polled agreed with the statement that the community should not frown on unmarried couples living together. In 1977 a Gallop poll survey asked whether people approved of couples living together. Seventy-five per cent of those aged 30 and under said 'yes', 58 per cent of those aged 50 and over said 'no'. There were geographical differences in response, rural people being more disapproving than those living in urban areas.

One thing that *can* be measured and monitored is the amount of litigation and legislation involving informal marriages. In the past decade in the USA, UK and Australia this has been significantly on the increase. The law as an instrument of social change is notoriously tardy, and as a mirror of that change it tends to be distorting. However, recent legal developments have been of such a nature that some commentators are finding a blurred demarcation line between formal and informal marriages in the rights and obligations attached to the participants.

Historical Trends

Historically, the relationship between marriage law and property law was a close one. Before the period of industrialisation status depended upon an alliance of political power and economic wealth. Marriage was an important connecting link in determining status, and this in time was intrinsically tied to the importance of legitimacy, which enabled power and wealth to be passed on to an acceptable group. Conversely, for those groups who were powerless and poor marriage was irrelevant as it offered them no advantage. So legal marriage was basically for the wealthy — a means of preserving property and inheritance rights but for the poor an unnecessary trapping.

Today informal marriages are of legal and social significance on two interrelated levels. One is their *intrinsic* importance — what do such relationships offer people today, how many people are choosing them and what public policy considerations are relevant? The second level is the possibility that by studying informal relationships formal marriage can be put

into perspective and its characteristics, future, etc. studied. It is only when the developments in both marriage types are compared and contrasted that the full implications of developments in either emerge.

The sanctity of marriage has only comparatively recently been related to its formalisation. Until the Middle Ages marriage was secular, personal and independent of the law, and mutual consent plus consummation were sufficient to establish a binding relationship. During the Middle Ages the church's role became more invasive. Ecclesiastical courts gained jurisdiction in enforcing matrimonial obligations and punishing defaulters. But still the church's only involvement in marriage formation prior to the Reformation was to require a celebration at the church door with a church blessing.

After the Reformation, European Calvinist and Lutheran churches redefined marriage as non-sacramental, and remarriage was permitted for the 'wronged' party. The Catholic Church however, reacted to the Reformation by the Decree Tametsi, passed at the Council of Trent (1562-63) by delegates who claimed that informal marriages threatened inheritance rights, preservation of the family, private morality and social peace. The Decree insisted on public formal marriage as a condition for its validity, a priest and at least 2 witnesses being required to participate. Until the Council of Trent private, informal marriages had been on an equal footing with public formal ones. Interestingly, marriage did not gain recognition by the church as a sacrament until the mid-seventeenth century.

Later in England, Lord Hardwicke's *Marriage Act* of 1753 introduced the requirement of a Church of England ceremony for the validity of all marriages (except those of Quakers and Jews). This saw the end of the doctrine of common law marriages in which couples who cohabited with the intention of marrying and were accepted as such by the community were considered to be married in all senses of the word. (This doctrine still applies in some American states.) The Act also successfully prevented Roman Catholics from legally marrying.

Civil marriages were not really catered for until 1836 when formalities regarding such marriages were introduced, but this was still only an optional system. Ecclesiastical jurisdiction over marriage formulation and termination can be said to have survived in England until 1857 when the *Matrimonial Causes Act* conferred jurisdiction to grant divorces in civil courts.

Later, the industrialising world came to accept the 'appropriateness' of state regulation of the formation, organisation and dissolution of marriage. The law became closely involved with social conduct, often in great detail as with the codifications of Prussia (1794) and France (1792). Furthermore, in the eighteenth and nineteenth centuries, the indissolubility of marriage and the emphasis on marriage as performing the 'correct' social function permeated the law. This ideology concealed the property transmitting function of marriage, stressing rather its moral and religious attributes.

The Position Today

Today it appears that the law and social conduct are diverging, and the private order area is increasing. The contemporary tendency in the western world towards no fault divorce reduces legal tendency in the western world towards no fault divorce reduces legal intervention in the dissolution itself, but regulation of economic and child-related aspects has increased over the past 50 years. Children are no longer only important in so far as they can inherit property (status of children legislation has in any event separated this from their legitimate status), courts being required to enquire into the welfare, which is frequently stipulated as being of paramount consideration.

Today the private purposes of marriage have become less exclusive, and informal marriages have increased in popularity; the law's function is to adapt accordingly. The effectiveness and cogency of family law is surely dependent upon its relevance to current social behaviour and attitudes.

One often repeated difficulty about informal marriages is the range of commitment they encompass. The law describes marriage as a life long relationship (notwithstanding the availability of divorce since the mid-nineteenth century) between two people of the opposite sex who are not within the prohibited degrees of blood relationship. However, informal marriages may be of a very short or spasmodic duration (e.g. over weekend periods only) and at the other end of the spectrum they may be a mirror image of a formal marriage, but lacking the appropriate legal documentation. Informal marriages are widely believed to be of shorter duration than their formal counterparts, the absence of registration apparently being equated with a weaker level of commitment. This belief may change as divorce legislation becomes more liberal and readily accepted, and serial marriages become more common.

There is also difficulty in terminology. Whilst a spouse is a husband or wife, is an informal partner just that, or a lover, paramour, de facto or consort? Many of these words have

perjorative implications which die hard. In Sweden, where living together is a recognised social status called sammanboende, people identify themselves as being married, single or sammanboende. As previously mentioned, the Australian Bureau of Statistics in its Census form takes only incidental account of relationships other than marriage. This presumably results in some confusion amongst those people who really fall into neither of these categories — they may be excused for supposing that their relationship is not tolerated by the Federal Government in much the same way the Queen Victoria failed to tolerate lesbians because of an apparent lack of knowledge of their existence.

What categories of people make up the untotalled category of Australians living together informally and why are they living together in this way? One group of people traditionally in such a category has been the man or woman tied to a marriage from which he or she could not be extricated. Such a group need no longer exist, as the *Family Law Act* permits divorce after 12 months separation regardless of the unwillingness of a respondent spouse. However, there are undoubtedly groups of people in the community whose religious beliefs prevent them from divorcing, and some who feel that divorce is socially unacceptable.

In the area of conjecture once again, a failure to marry may be based on an economic consideration, such as the loss of a pension or benefit, or the much publicised and bemoaned high divorce rate may encourage people to plan carefully before legally committing themselves. This may be particularly true of divorced people who are wary of repeating the same mistake — although the remarriage rate after divorce is high.

Percentages of Remarriages

	1975	1976	1977	1978
Bridegrooms	10.3	17.6	19.4	19.5
Brides	9.9	16.5	19.3	18.5

Among just over 100 000 marriages performed in Australia in 1978, nearly 40 000 participants were divorced persons. As could be expected, remarriage rates are related to the age of the parties at the time of dissolution. Thus in 1976 it was found that 80 per cent of those people divorced before the age of 30 remarried within 6 years of the divorce, and most marriages of people over 30 in that year were remarriages.

There are also people who avoid marriage on ideological grounds and consider that the legal constraints it imposes are an unacceptable infringement of human freedom. The employment and fertility options now available to women have resulted in marriage becoming a question of choice rather than the only blueprint for life. There are no figures on how many people fall into this category in Australia.

Informal marriage also appears increasingly to be accepted among diverse social groups. It has been claimed that lack of concern with marriage laws (rather than antipathy to them) has been increasing among many who were not previously outside the mainstream of society, and who until recently accepted unquestioningly the traditional purposes and effects of marriage.

Legal Effects of Marriage

What have been the legal effects and implications of marriage in our society and how have these undergone change? Obviously, to legally terminate a formal marriage a divorce must be obtained, and as previously mentioned, since 1976 this has been available in Australia on the sole ground of irretrievable breakdown as shown by 12 months separation. The *Family Law Act*, which permits divorce in the above circumstances, also prescribes to some extent the rights and obligations of marriage partners.

Thus a party to the marriage is liable to maintain the other when there is reasonable ability to do so *only if* the other party is unable to support himself or herself because of physical or mental incapacity, because he or she is caring for a minor child, etc. Similarly, during the marriage, (until a court orders otherwise) each spouse is joint custodian and guardian of children of the marriage and liable according to his or her financial resources to maintain these children during their minority.

The Family Court has power to make property, custody, access and maintenance orders in matters arising out of a marital relationship. It has *no* jurisdiction to hear disputes arising out of relationships not based on marriage, and cannot deal with the children of such relationships. This unfortunate restriction in the court's powers occurs not because of a moral antipathy to informal marriages and any children they may produce, but because of the wording of the Australian Constitution. Section 51 (xxi) and (xxii) give the Federal Parliament power to make laws with respect to marriage, divorce and matrimonial causes 'and in relation thereto parental rights and the custody and guardianship of children'. Non-marital relationships and children of such relation-

ships are insufficiently connected with marriage to come within Commonwealth power.

Legislation is also relevant in changing aspects of marriage, but at the State rather than the Federal level. For example, at common law a husband could not be found guilty of raping his wife, her unconditional consent to intercourse being considered to continue for the duration of the marriage, regardless of the circumstances. This unrealistic principle has been modified by statute in South Australia and Western Australia and changes are currently being considered in Victoria. In South Australia rape is legally possible where the alleged offence was in some way associated with assault occasioning the threat of or actual bodily harm or the threat of or occurrence of an act calculated seriously and substantially to humiliate the spouse. In Western Australia a husband may be found guilty of his wife's rape where intercourse occurred against her will during a time when they were not living in the same residence.

Some other legal effects of marriage have been modified with the introduction of no fault divorce and the acceptance of the changing role of women. Before the *Family Law Act* came into operation the spouses' duty to cohabit meant that the desertion of one by the other was a matrimonial offence which could lead to a dissolution of the marriage. Similarly, infidelity was a possible precursor to a divorce on the grounds of adultery.

At common law a husband was obliged to support his wife and she had no legal capacity to enter into contracts on her own, or to sue or be sued in tort. Even today (at least in Victoria) when a married women buys 'necessaries' (such as food and clothing) the law presumes that she is acting as her husband's agent unless at the time of the transaction she makes the contrary position clear. Therefore a husband is bound by contracts of this nature. However, a married woman now has full capacity to enter into contracts in her own right and be bound by them, and can sue or be sued in tort, rights and obligations which are reiterated in the *Family Law Act*. The rationale for legal doctrines which denied married women legal capacity is based on the statement of the legal commentator Blackstone that 'in marriage, husband wife are one person and that person is the husband' (1765). Married women for centuries were as disadvantaged as infants and lunatics. Even currently in Victoria a husband and wife cannot be found guilty of the crime of conspiracy in the absence of others, as they are considered to be one person and conspiracy requires at least 2 people. At common law the unity of a married couple prevented them from being able to steal from each other, and in Victoria at the present time no legal proceedings can be taken if spouses were cohabiting at the time of the theft.

Presumptions of unit do *not* enter into the area of informal relationships, and legal regulation of such relationships is variable, as will be shown below.

Marriage has recently been deprived of one of its traditionally important characteristics, that of distinguishing the legitimate family from others in the area of succession. Legislation passed in the last decade in all Australian States (except Western Australia where piecemeal amendments have been effected) has eliminated the legal status of illegitimacy, and an ex-nuptial child now has equal right to his/her father's estate — provided paternity can be established. An interesting feature of this legislation is that it was passed throughout Australia with little public comment, and general awareness of it appears to be small. Perhaps this is because it has little effect on the great majority of ex-nuptial children who are living with single mothers whose problem is poverty — and an unequal social position because of that poverty — irrespective of nuptial status.

The Family Court

Because the *Family Law Act's* operations are restricted to the area of marriage, any relationship falling outside this must be legislated for at the State level. However, peripherally, on a few occasions the Family Court has taken into account the effects of an informal marriage. This in *Olliver* (1978) FLC 90-499 the parties had cohabited for 10 years before embarking on a 2 year marriage. In a dispute about property and maintenance the Full Court found that it was entitled to consider the entire period of cohabitation to determine the issues under dispute. However, in the cases of *Lutzke* (1979) FLC 90-714 and *Ostrofski* (1979) FLC 90-730 it was held that a husband's financial obligation to a de facto spouse or her children could not be taken into account as a responsibility 'of either party to support any other person' (s.75(2)(e)). Mr Justice Lambert in *Ostrofski* went so far as to say that this was an obligation assumed by the husband incompatible with S.43 *Family Law Act* and which, if recognised, would confer a financial advantage on the de facto union, to the detriment of the spouse and children of the marriage.

The Role of Commonwealth Laws

Commonwealth laws financially affect the status of many people living in informal marriages. Under the *Superannua-*

tion Act (1976) 3 years cohabitation qualifies the survivor of a contributor to benefits, unless cohabitation commenced after the deceased reached the age of 60 (in which case the qualifying period is 5 years).

The *Social Services Act* (1947) contains a myriad of provisions. For example, a widow's pension is payable to (among others) a woman who lived with a man as his wife in a bona fide domestic situation for at least 3 years prior to his death. The Department of Social Security has what is called a cohabitation rule which is intended to prevent couples who live together as husband and wife from being placed in a better position for pension or benefit purposes than a legally married couple. Payments of widow's pension, supporting parents benefit, etc. are terminated when the Department, via its officers, is satisfied that the woman is living with a man on a 'domestic bona fide basis'. Complaints are fairly frequently received that benefits are unjustifiably terminated where either a woman is not cohabiting, or there is a cohabitation but the man is not economically supporting the woman. The Department does seem to have operated sometimes on unwarranted and incorrect assumptions that a man who is cohabiting with a woman is economically supporting her —this may be untrue both in and out of marriage. There are inevitable complaints because of the sensitive and intrusive investigations which occur and the seeming impossibility of defining exactly what cohabitation is.

The Role of State Laws

At the State level, the picture is of course much less clear, and there is no consistency. For example, in Tasmania since 1837 a woman who has cohabited with a man for at least 12 months is entitled to a maintenance order if he deserts her without just cause or excuse, or is guilty of such misconduct to her that it would be unreasonable to expect her to live with him. This is a unique provision.

South Australia has comprehensive legislation, called the *Family Relationship Act* (1975) from which rights, status and obligations flow where the relationship is terminated by the death of one of the parties. South Australians must however qualify as a 'putative spouse' to come within the provisions of the Act, and must apply to a local or the Supreme Court for a declaration that the status by legally recognised.

A putative spouse as defined in the *Family Relationship Act* is one who on a certain date (usually the death of a spouse) has lived with another for at least 5 years, (or a period amounting to 5 years or more over the previous 6 years) or has had sexual relations resulting in the birth of a child. In *re Fagan Deceased* (1980) FLC 90-821 the applicant applied for a declaration that she and Fagan had lived together for the requisite 5 year period before his death. Intimate details of the relationship were provided to the court to show that in its early stages the parties were not cohabiting exclusively with each other (as the applicant was still living with her parents and the deceased with his wife), but that nevertheless they were involved in an informal marriage relationship. This evidence was accepted and the applicant obtained her declaration, which in turn enabled her to be recognised as the deceased's next of kin.

The *Family Relationship Act* amends other South Australian legislation such as the *Succession Duties Act* (1929-76) (thereby giving a putative spouse the same exemption from Probate Duty as a formal spouse who is a beneficiary under his or her spouse's will), and the *Administration and Probate Act* (1919-75) (so that an informal spouse is considered a next of kin where the putative spouse dies intestate. Interestingly, where the deceased is survived by both a formal and a putative spouse they share equally). The criticisms of the South Australian provisions are that, in the absence of a child being born to the couple the 5 year cohabitation period is too long, and that the law does not protect a putative spouse where the relationship has been terminated for a reason other than death. However, the position in South Australia is much clearer than it is in any other State.

Anti-discrimination legislation has been passed in South Australia, New South Wales and Victoria in the last 5 years and has been drafted but not yet passed in Tasmania. With varying exceptions, discrimination on the basis of sex or marital status is prohibited in these States. In all but Victoria 'marital status' is defined to include (along with the more 'clear cut' instances) cohabitation, for an undefined length of time, with someone of the opposite sex falling short of marriage. Once again, the failure to enact progressive, uniform legislation throughout Australia has produced unfortunate inconsistencies. Victoria's legislation in effect appears to discriminate against those living outside the boundaries of formal marriage.

Property Disputes

The area of property disputes between informal marriage partners has occupied the courts in England and Australia, particularly over the last decade. Matrimonial property disputes are heard by the Family Court, and the *Family Law Act* gives judges wide discretion to make such orders as they

think fit, provided they are just and equitable. This enables them to go beyond the legal title to property where they consider it necessary. Moreover in Victoria married couples may come within the ambit of the *Marriage Act*, (1962) s. 161 of which includes a statutory presumption of joint ownership of matrimonial property, unless contrary evidence is produced.

At common law the registered proprietor of a property is its owner, and no statutory provision exists to enable a judge to go beyond that principle when looking at, for example, any rights an informal wife may have where she has lived in a house (and maybe contributed to its purchase) with a man who is the registered owner. However, courts in England and Australia have recently made use of the equitable doctrine of the trust (and in some cases the licence) to moderate the harshness of the common law where this is considered necessary. For example, in the English case of *Cooke v. Head* (1972) 2All E.R. 38 the plaintiff 'wife' lived with the defendant who bought a block of land, and the two partners built a bungalow where they lived for 2 years until they separated. Miss Cooke sought a declaration of joint ownership of the property and upon being awarded a one-twelfth share, appealed to the Court of Appeal. This court awarded her one-third of the proceeds of sale, holding that the asset was acquired by joint effort for the common benefit of both parties, and that there was an oral agreement leading to the 'husband' holding the bungalow on trust for himself and his 'wife'. Miss Cooke had made no financial contribution to the purchase of the land, but both parties had saved from their earnings and the savings were used for mortgage repayments. In addition *both* had done a great deal of the actual building themselves.

Australian decisions in this area have been more cautious than their English counterparts. In *Allen v. Snyder* (1977) 2 NSWLR 685 the New South Wales Court of Appeal refused to imply a trust from the circumstances of the evidence, and maintained that an actual common intention of the parties was required before one could be established. A recent Victorian case of *Hohol* (1980) FLC 90-824 takes this principle one step further. Here the couple had cohabited for 35 years and 4 children had been born of the relationship. The 'wife' had not worked but had performed domestic duties and raised the children. The 'wife' successfully claimed a joint interest in a farming property used as the family home. Mr Justice O'Bryan found that there was a common intention to acquire the property jointly, the 'wife' had acted to her detriment in moving to the property which was in a primitive condition, and it would be fraud on her now to deny her part ownership. The judge held that a common intention in these circumstances could be inferred as a matter of fact from the words or conduct of the parties.

There have been several other English and Australian cases decided in the past decade which extend the rights of informal marriage partners beyond the limits of the common law. However, the device of the trust is really an artificial one. In some jurisdictions only monetary contribution of the parties to the acquisition or improvement of the property is taken into account, and in all cases the need to go to such lengths to make a case is expensive and time consuming. Whereas assumptions about unity and equality of formally married couples are readily made by the law, informal marriage partners have to spell out their case laboriously by relating the details of their particular relationship.

A question frequently asked in the area of informal marriages is: should the law recognise them? It has been suggested that people living in such relationships have elected to place themselves outside the range of the law, and the law should therefore not intrude. Objections are also raised by those who consider that the recognition of alternative relationships devalues the sanctity of marriage which has traditionally been accepted as the corner stone of the family, and thence society. The tendency of modern family law is for the law (albeit grudgingly, slowly and in a piecemeal fashion) *not* to ignore the non-marital relationship , which is consistent with its role of assisting the family as a social and not merely a *legal* unit.

A parallel question may well be, why is there state regulation in the area of the *family* at all? The traditional justifications for regulation are that laws will protect the weak, will ensure stability and will promote public morality — and public morality and stability have been equated with formal marriage.

Informal Marriage Partners and Their Children

What effect has Status of Children legislation had on the status of *parents* in an informal marriage? The basic premise of the various Acts is that a child's relationship with his or her father and mother shall be determined regardless of whether they are or have been married to each other. The presumed effect of this is that parents of an ex-nuptial child would have the same rights and obligations with respect to that child as they would have had he or she been born within a marriage. But the courts have not always interpreted it that way.

As previously mentioned, under the *Family Law Act* married parents have joint custody and guardianship of their chil-

dren, until further order. But non-custodial parents (usually the father) of an ex-nuptial child still do not have full rights equal to those of the mother, even where they fulfil their obligations to maintain the child. Claims for custody and access are only possible via expensive Supreme Court wardship proceedings which have no back-up counselling staff nor judges with any particular interest in family law matters. Although recent decisions have stressed that the welfare of the child is the paramount consideration, there have been inconsistencies. For example, in *WvH* (1978) VR.1 proceedings were instituted in the County Court by a mother of two children and her husband for their adoption. The natural father opposed the adoption and applied to the Victorian Supreme Court for orders that the children (for whom he paid maintenance and to whom he had access) be made wards of the Supreme Court and that he continue to have access to them.

Mr Justice Jenkinson held that the Victorian *Status of Children Act* (1964) had *not* produced the result that a putative father was a person whose consent to adoption is required by the *Adoption of Children Act* (1964) (s.23 of the Act says that where a child is illegitimate the appropriate person to consent to his or her adoption is the mother or guardian). However, the judge ordered that the adoption order should not be granted as it was not in the children's best interests and made them wards of the court. Physical custody in those circumstances was to go the the mother, with the natural father having access for 10 consecutive days each year.

As the *Adoption Act* has not been amended, had the father not heard about the adoption proceedings independently, they would have been completed without his knowledge.

However, the previous year in *GvP* (1977) VR.44 a dispute arose between natural parents of an ex-nuptial child after the mother unilaterally changed the child's surname to that of her husband. Mr Justice Kaye held that by operation of s.3(1 *Status of Children Act* the father of an ex-nuptial (called in the judgement illegitimate) child is his or her guardian. By changing the child's name without the father's consent the mother had infringed a guardianship right.

In the New South Wales case of *Griffin* v. *Gorey* (1978) FLC 90-504 the father of an ex-nuptial child sought access to that child in the Children's Court. The mother argued that the Children's Court was not the appropriate venue and the matter was finally decided in the father's favour at the Full Court at the Supreme Court level. The judgement is technical and what began as a simple dispute ended up in expensive and lengthy proceedings.

Overseas Trends

What overseas developments have taken place recently in countries with similar legal systems to our own? As previously mentioned, the English courts have dealt with property disputes between unmarried partners, and with some judicial creativity have used the law of trusts to avoid injustice. Sporadic legislation in England has also played its part. In 1976 the *Domestic Violence and Matrimonial Proceedings Act* came into operation. This Act gives courts the power to grant injunctions restraining spouses from molesting the applicant and children, and is expressly stated to apply where people are cohabiting as man and wife outside marriage

However, the Act has not been without its critics, and during a 2 month period in 1978 was the subject of 3 appeals to the Court of Appeal, one of which (*Davis v. Johnson* (1978) 2WLR 553 progressed from there to the House of Lords. In rather Dickensian language Lord Diplock in *Davis v. Johnson* refused to accept that Parliament had intended to change the substantive law 'by allowing judges to make drastic inroads upon the respective legal rights of parties so an illicit union to occupy the premises in which they have been living together as man and wife'. (p.564)

Unlike the Australian Family Court, English courts dealing with divorce *will* take into account a man's moral obligation to an informal wife when assessing his overall financial situation to determine the maintenance due to a 'legal' wife. Otherwise the English approach is similar to the Australian, in that solutions to problems affecting informal marriage partners tend to occur in piecemeal fashion without any coherent pattern.

The laws and practices of the various American States differ greatly. In some States adultery is still a criminal offence and divorce is not socially acceptable; in others a very *laissez faire* approach is taken to both phenomena. California best represents the latter attitude, but even there precedent got in the way. In a 1943 case, *Vallera v. Vallera* 134PZd 761 (Cal. 1943) the California Supreme Court held that a woman living with a man (described as a 'meretricious spouse') acquired no legal right to his property and would not be assisted by the use of equity, even if hardship resulted. It was not until 1973 that this principle was departed from, the court holding that where there was an 'actual family relationship' community property rights were acquired — (In *re Marriage of Cary*, 109 Cal. Rptr. Cal. App. 1973). The matter was fully discussed in the much publicised case of *Marvin v. Marvin* (Case no. C-23303 Sup, Crt. Los Angeles (1979)). Here the parties lived together for 7 years. All property acquired was registered in

the 'husband's' name but the 'wife' alleged the existence of an oral contract in which it was agreed that all assets were to be shared equally and the 'wife' would relinquish her career in return for lifetime support. On separation and for 18 months thereafter Lee Marvin paid his informal marriage partner $800 per month. When these payments ceased she instituted proceedings seeking half of all property acquired during the cohabitation period. In the course of several years of litigation various Californian courts referred to the prevalence and social acceptance of non-marital relationships, and distinguished these from previously unenforceable agreements which were void because they were based on an illegal consideration (i.e. sexual services).

The California Supreme Court held that, where there was no express agreement, the court could examine the conduct of the parties to decide whether it showed that there was an *implied* contract. It recognised that parties to an informal marriage have the same rights to enforce contracts and claim equitable rights as do any other unmarried people. The plaintiff 'wife' was granted lump sum 'maintenance' as a form of rehabilitation to give her the economic means to re-educate herself or learn new employable skills.

The possibility of parties to an informal marriage drafting their own cohabitation contract has been mooted for several years as a way of avoiding disagreements should they choose to separate at a later date. This however, is fraught with public policy and other difficulties. Historically, as mentioned above, the law has refused to enforce contracts based on 'immoral' promises, such as the promise to cohabit outside marriage. However, judges are increasingly making pertinent comments about changing community standards and the need for the law to adjust to them.

European countries such as France and Germany are civil law countries, in the sense that their legal systems derive from the Roman law. Here *marriage* contracts are the norm and couples decide prior to the marriage ceremony whether they will pool or keep separate their assets acquired during the marriage, and a document to this effect is signed before a notary. In common law countries such as England, Australia and the United States (where the legal system is based on the English tradition of judge's decisions and custom) property contracts are rare, except in the case of the very wealthy. In addition, any contract which goes beyond financial arrangements and deals with aspects such as distribution *on dissolution* have traditionally been considered to be against public policy (because marriage is considered to be 'for life'). So, contracts may be superimposed upon the formal marriage contract, to a certain limited extent. Contracts in lieu of marriage are of course a different dimension again. Moreover, courts are loath to accept the ousting of their jurisdiction that is, the court sees itself as the appropriate forum for determining issues of significance, and these therefore cannot be negotiated privately.

Although marriage contracts may not be enforceable, they may raise public awareness and isolate issues which in future may prevent bad unions (formal or informal) and in turn avoid later, more bitter, disputes.

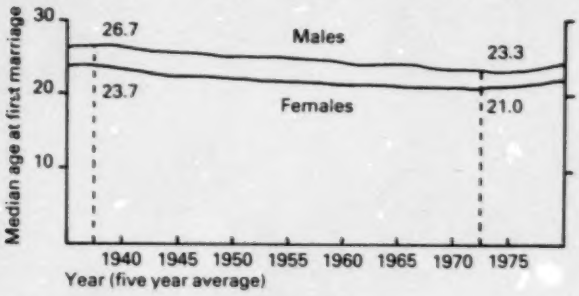
The recent report of the Parliamentary Joint Select Committee on the *Family Law Act* included a recommendation that arrangements for the introduction of a Matrimonial Property regime be considered, the rationale being that such a regime would enable parties to a marriage to know what their rights and obligations within and at the termination of the marriage were. The Committee had no power to consider relationships other than marriage, but in an informal marriage obviously certainty and protection for a weaker partner are of great importance.

Conclusion

Informal marriages form a significant but unknown number of unions within Australian society, increasingly tolerated by the community and the legal system. However, the law's reaction to them is still sporadic, (and, being largely State initiated) inconsistent and even contradictory. How far the generally grudging attitude of the law to marriage alternatives is based on outdated moral attitudes euphemistically called 'public policy', and how far its traditional lack of haste is responsible, is unknown. Certainly there is now a body of case and statute law covering aspects of unmarried cohabitation, and this trend is evident also in countries with legal systems and cultural backgrounds similar to our own.

Marriage in Australia is undergoing change. During the 1970s Australians began to delay marriage, a trend which is expected to continue. The widespread use of reliable contraceptives, increased work opportunities for women and the high material expectations of an affluent generation have brought about a reduction in the significance of marriage as a life cycle event. And yet, paradoxically, Australians still appear to be very concerned about marriage and may be marrying later because the 'proper time' is the time when the participants are more likely to make a success of their union. The figures have become a little skewed because of the shift in age of marriage, but it would appear that formal marriage

Figure 2 : Median age at first marriage, Australia 1935-1975



is the expected goal of by far the majority of people in this country today.

The *nature* of informal marriage needs researching. Are couples living together *prior* to marriage in order to try to determine their commitment to each other which they hope will be life long? Are they equating marriage with child-birth and formalising their arrangement prior to the birth of the first child? Are they living together *instead* of marrying, because they consider marriage an outdated and meaningless institution? Are they either deterred or encouraged by the withholding or conferring of legal rights and benefits on them? One of the Institute of Family Studies' first research projects will attempt to obtain information in answer to these questions.

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